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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.327 of 2001

APPELLANTS: Kamta Prasad Lodhi & two others

- Versus -

RESPONDENT: The State of Chhattisgarh

Criminal Appeal No.361 of 2001

APPELLANT: Pawan Kumar alias Nagraj Sahu

- Versus -

RESPONDENT: State of Chhattisgarh

AND

Criminal Appeal No.362 of 2001

APPELLANTS: Dileep @ Bathu @ Ashok & another

- Versus -

RESPONDENT: State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. BHADOO
Judge
29-3-2007

HON'BLE MR. JUSTICE DHIRENDRA MISHRA

Sd/-
Dhirendra Mishra
Judge
30-3-2007

POST FOR PRONOUNCEMENT OF JUDGMENT ON 2ND APRIL, 2007

Sd/-
L.C. BHADOO
Judge
30-3-2007

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.327 of 2001

APPELLANTS/:
(Accused)

1. Kamta Prasad Lodhi,
   S/o Piduram Lodhi,
   Aged 23 years.

2. Ashwani Kumar,
   S/o Khamhan Lal Lodhi,
   Aged 20 years.

3. Ganesh, S/o Bahru Ram Lodhi
   Aged 24 years.

All residents of Village: Sonesarar,
Thana Dhamdha, District Durg.

- Versus -

RESPONDENT: The State of Chhattisgarh, through the District Magistrate, Durg.

Criminal Appeal No.361 of 2001

APPELLANT/:
(Accused No.4)

Pawan Kumar alias Nagraj Sahu,
Aged about 21 years,
S/o Shri Gendlal Sahu, Driver,
Resident of Village Kotarapara
Jamul, District Durg (Chhattisgarh).

- Versus -

RESPONDENT: State of Chhattisgarh

AND

Criminal Appeal No.362 of 2001

APPELLANTS:

1. Dileep @ Bathu @ Ashok,
   S/o Kriparam Nirmalkar,
   Aged about 21 years.

2. Raju @ Rajesh @ Raj Kumar,
   S/o Man Singh Sahu,
   Aged about 28 years.

Both residents of BAJRANG PARA,
P.S. Jamul, Distt. Durg (C.G.)

- Versus -

RESPONDENT: State of Chhattisgarh,
Through P.S. Dhamdha,
Distt. Durg (C.G.)

Present: -

Mr. Uttam Pandey, Advocate:	For the appellants in Cr.A.Nos.327/2001 and 362/2001.
Mr. P.K.C. Tiwary, Senior Advocate with Mr. Shashi Bhushan, Advocate:	For the appellant in Cr.A.No.361/2001
Mr. U.N.S. Deo, Addl. Public Prosecutor:	For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. DHIRENDRA MISHRA, JJ.

JUDGMENT

(Delivered on 2nd April, 2007)

The following judgment of the Court was delivered by *L.C. Bhadoo, J.*: -

1. Criminal Appeal No.327/2001 filed by Kamta Prasad Lodhi, Ashwani Kumar & Ganesh; Criminal Appeal No.361/2001 filed by Pawan Kumar alias Nagraj Sahu; and Criminal Appeal No.362/2001 filed by Dileep @ Bathu @ Ashok & Raju @ Rajesh @ Raj Kumar are arising out of the same judgment passed by the 1st Additional Sessions Judge, Durg in Sessions Trial No.25/2000, therefore, they are being disposed of by this common judgment.

2. The accused persons have filed these appeals questioning legality and correctness of the judgment of conviction and order of sentence dated 27-3-2001 passed by the 1st Additional Sessions Judge, Durg, in Sessions Trial No.25/2000, whereby learned Additional Sessions Judge convicted and sentenced the accused/ appellants as under: -

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Name of the accused	Offence under which convicted	Sentences imposed
Pawan Kumar @ Nagraj Sahu	Section 120-B of the I.P.C.	Life imprisonment and fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 3 months.
	Section 302 of the I.P.C.	Life imprisonment and fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for six months.
Ashwani Kumar, Ganesh, Kamta Prasad Lodhi, Dileep @ Bathu @ Ashok & Raju @ Rajesh @ Raj Kumar	Section 120-B of the I.P.C.	Life imprisonment and fine of Rs.500/- each, in default of payment of fine to further undergo R.I. for three months.
	Section 302 read with Section 34 of the I.P.C.	Life imprisonment and fine of Rs.1,000/- each, in default of payment of fine to further undergo R.I. for six months.

Learned Additional Sessions Judge further directed that substantive sentences imposed on each accused shall run concurrently and also directed that the detention period of each accused shall be set off against the sentences imposed upon them.

3. Case of the prosecution, in brief, is that accused Kamta Prasad installed a bore well in the land of Abhayram. Therefore, the dispute started between accused Kamta Prasad and the deceased persons. The co-accused persons of Kamta Prasad namely, accused persons Ganesh & Ashwani Kumar also used to quarrel

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with the deceased persons. Accused Kamta Prasad used to give threatening to Abhayram & Mukutdhar for committing their murder.

4. Further case of the prosecution is that on 31st October, 1999 (Sunday) accused Pawan Kumar @ Nagraj Sahu, who was working as Driver of tanker bearing No.MP-24/A-5354 of Mahendra Singh (PW-9), went to Village: Sonesarar to the house of Kamta Lodhi at 12 - 12.30 p.m. Accused Kamta Lodhi consumed liquor at his residence with his friends. He openly said that "आज साले लोगों को मारना है बचना नहीं चाहिए". It was heard by Khemuram. The tanker was being driven by Ashwani Lodhi. Deceased persons Abhayram & Mukutdhar went to Dhamdha on their scooter No.MUJ-637 for some domestic work. After some time, Ashwani, Ganesh & others followed them in the tanker. Accused Kamta went to Dhamdha on bullet No.MP-23/K-3283 with Pawan @ Nagraj who is the friend of accused Kamta. The accused stopped the bullet in front of the liquor shop of Vijay Mishra. On that day, Kamta Patel (PW-6) along with his cousin Surya Prakash Patel (PW-7) went to Village: Sonesarar to collect their wire Tochan from the house of accused Kamta Lodhi, on which father of Kamta Lodhi informed them that Kamta Lodhi has gone to Dhamdha, therefore, they came to Dhamdha and saw that the tanker was standing at the bus stand, accused Kamta Lodhi, Ganesh, Ashwani, Pawan @ Nagraj and his helper were sitting in the tanker. At that time, Kamta Patel (PW-6) demanded his wire Tochan and he also said that if Tochan is not there then he may be paid the price of Tochan, on which accused Kamta Lodhi said that in 2-4 days he will send the money. After some time, accused Kamta Lodhi asked Kamta Patel (PW-6) that let us go towards Hatri on which Kamta Patel replied him to take scooter, but accused Kamta Lodhi did not agree to that therefore, Kamta Patel took the scooter towards Hatri, when he was in Hatri, Kamta Lodhi asked him to accelerate the speed of the scooter as the person has already gone, on which Kamta Patel said that there is crowd, therefore, he can turn the scooter, then accused Kamta Lodhi said that the person is looking at him, therefore, let us go towards Hatri. Thereafter, Kamta Lodhi took the scooter towards the tanker. The associates of accused Kamta Lodhi were standing there. After some time, deceased persons Abhayram & Mukutdhar came to the market on a scooter, stood near the betel shop and enquired about the owner of the egg's shop on which Naresh Kumar informed that he has gone to fetch water, therefore, they went to some other shop to purchase eggs and thereafter, they

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left on scooter for their residence. At that time, the tanker went towards the petrol pump. When Abhayram & Mukutdhar left on the scooter, the tanker also started following them and accused Kamta Lodhi along with Ganesh and one more person also followed the tanker on the bullet. Thereafter, one person on Suzuki came from the side of Durg, he informed that two persons who were on scooter have met with accident and they are lying on the road. Prior to that, accused Kamta Lodhi requested Kamta Patel (PW-6) that he need a truck for crushing one person under the truck, therefore, he should arrange for a truck, on which Kamta Patel refused to accede his request. Kamta Patel (PW-6) along with his cousin Surya Prakash Patel (PW-7) hearing the news about the accident went on the spot and saw that the scooter was lying in damaged condition, Abhayram & Mukutdhar were lying on the road, therefore, they informed at the residence of Abhayram.

5. Further case of the prosecution is that after few days of the accident, accused Pawan @ Nagraj came to Rajesh Kumar Dubey (PW-8) and said that he has to apply for anticipatory bail because he has committed the murder of the enemies of his friend Kamta Lodhi by crushing them under a tanker. On the day of incident he also made extra judicial confession before the owner of the tanker namely, Mahendra Singh (PW-9), over telephone that he has committed the murder of two persons by tanker and when he met Mahendra Singh (PW-9), he said that after consuming liquor with his friend he has committed the murder of two persons by crushing them under the tanker. He also made extra judicial confession before Rajesh Kumar Dubey (PW-8) that he took the tanker to the residence of his friend, consumed liquor and thereafter crushed two persons, enemies of his friend Kamta, under the tanker, out of the two, one was alive, therefore, he took the truck in reverse and crushed the person who was alive. He further said that his friend is helping him, as he is a wealthy person.

6. Surendra Prasad Jaiswal (PW-12), who witnessed the accident, lodged the report on 31-10-1999 in Police Station: Dhamdha at 6 p.m. before Shivcharan Sahu (PW-18), Head Constable, who registered the report Ex.P-13 for commission of offence under Sections 279 & 337 of the I.P.C. Thereafter, Ramprasad Sahu (PW-19), Assistant Sub Inspector along with Head Constable Shivcharan Sahu proceeded for the spot of accident and under Exs.P-14 & P-15 injured Abhayram & Mukutdhar were sent for examination to Govt. Hospital, Dhamdha, through

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Constable Raj Kumar, but the doctor declared them brought dead. Merg intimations Ex.P-19 in respect of Abhayram and Ex.P-20 in respect of Mukutdhar were given. The dead bodies were kept in Mortuary. Next day after giving notice Exs.P-5 & P-6, inquest Ex.P-8 on the body of Mukutdhar and Ex.P-7 on the body of Abhayram were prepared. Thereafter, the body of Mukutdhar under Ex.P-21 and the body of Abhayram under Ex.P-22 were sent for post-mortem examination to Govt. Hospital, Dhamdha where clothes of the deceased persons were seized. The scooter No.MUJ-637 in damaged condition without silencer, shoes & chappals, paint container and brush were seized from the spot under Ex.P-4. Prahlad Pandey (PW-17), Patwari, prepared the site plan Ex.P-18. Dr. P.D. Chandravanshi (PW-15) conducted post-mortem on the bodies of Abhayram & Mukutdhar. He prepared post-mortem report Ex.P-16 of the body of Mukutdhar and Ex.P-17 of the body of Abhayram. He opined that cause of death of both the persons was due to excessive haemorrhage and shock as a result of head injury due to roadside accident.

7. After completion of investigation, charge sheet was filed against the accused persons in the Court of Judicial Magistrate, First Class, Durg, who in turn committed the case to the Sessions Judge, Durg, from where learned 1st Additional Sessions Judge, Durg received the case on transfer for trial.

8. The prosecution in order to establish charges against the accused persons examined 22 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which each of the accused denied the material appearing against them in the prosecution evidence and stated that they are innocent and they have been falsely implicated in the crime.

9. Learned Additional Sessions Judge after hearing counsel for both the parties, convicted and sentenced each of accused as aforementioned.

10. We have heard Mr. P.K.C. Tiwary, learned Senior Advocate for appellant Pawan Kumar @ Nagraj Sahu; Mr. Uttam Pandey, learned counsel for appellants Kamta Prasad Lodhi, Ashwani Kumar, Ganesh, Dileep @ Bathu @ Ashok & Raju @ Rajesh @ Raj Kumar; and Mr. U.N.S. Deo, learned Additional Public Prosecutor on behalf of the State/respondent.

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11. In this case, there is no direct or ocular evidence regarding the commission of murder of Abhayram & Mukutdhar. Whole case rests on the circumstantial evidence. The prosecution has tried to establish the crime against the accused persons on the following circumstances: -

(1) that, accused Pawan Kumar @ Nagraj Sahu made extra judicial confession before Rajesh Kumar Dubey (PW-8), Mahendra Singh Gill (PW-9) & Pritam Singh (PW-10) regarding the commission of murder of Abhayram & Mukutdhar by him by crushing both of them under the tanker bearing No. MP-24/A-5354 on 31st October, 1999;

(2) that, there was animosity between accused Kamta Lodhi on the one hand and deceased persons Abhayram & Mukutdhar on the other hand, as accused Kamta Lodhi installed bore well by encroaching on the land of Abhayram & Mukutdhar; and

(3) that, accused Kamta Lodhi entered into a criminal conspiracy with his friends co-accused persons Pawan Kumar @ Nagraj Sahu, Ashwani Kumar, Ganesh, Dileep @ Bathu @ Ashok & Raju @ Rajesh Kumar @ Raj Kumar to commit the murder of Abhayram & Mukutdhar.

12. In order to rest conviction based on the circumstantial evidence, settled law on the point as per the decision of the Apex Court in the matter of **Dhananjoy Chatterjee vs. State of W.B.** reported in **(1994) 2 SCC 220** is that;

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

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13. Now, we shall proceed to scrutinize the evidence adduced by the prosecution in order to connect the accused persons with the murder of Abhayram & Mukutdhar based on the aforementioned circumstances.

First circumstance

14. As far as this circumstance is concerned, Mr. P.K.C. Tiwary, learned Senior Advocate and Mr. Uttam Pandey, learned Advocate argued that as far as the extra judicial confession made by accused Pawan Kumar @ Nagraj Sahu before Rajesh Kumar Dubey (PW-8), Mahendra Singh Gill (PW-9) & Pritam Singh (PW-10) is concerned, the evidence of these three witnesses is contradictory to each other in respect of time when the accused made extra judicial confession before them. Reading of the evidence of these three witnesses makes it clear that the evidence is shaky and does not confirm to the standard laid down by the Apex Court for placing reliance on the extra judicial confession made by the accused.

15. On the other hand, Mr. U.N.S. Deo supported the judgment of the trial Court.

16. The Apex Court in the matter of **Balwinder Singh vs. State of Punjab** reported in **1995 Supp (4) SCC 259**, held that

> "An extrajudicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before placing any reliance upon an extrajudicial confession."

17. In another decision, in the matter of **Gura Singh vs. State of Rajasthan** reported in **(2001) 2 SCC 205**, the Apex Court held that

> "Extrajudicial confession, if true and voluntary, it can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extrajudicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. That the evidence in the form of extrajudicial confession made by the accused to witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that the confession was true and

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voluntarily made, then the conviction can be founded on such evidence alone. It is not open to the court trying the criminal case to start with a presumption that extrajudicial confession is always a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession.

The retraction of extrajudicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon such a confession. An unambiguous extrajudicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under Section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections 25 and 26. The court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true."

18. Therefore, in order to place reliance on the extra judicial confession, the Court is required to ascertain about voluntariness, truthfulness and promptness of the extra judicial confession made by the accused. While ascertaining voluntariness, truthfulness and promptness of the extra judicial confession, the Court has to scrutinize the evidence, the relevant circumstances, the person before whom the confession is made, time and place of making it and that the extra judicial confession is not the outcome of inducement, threat or promise or has not been made in suspicious circumstances. Where the Court reaches to the conclusion that the extra judicial confession is surrounded by suspicious circumstances or does not inspire full confidence of the Court, then the Court must look for independent reliable corroboration before placing any reliance upon the extra judicial confession.

19. Applying the above principle, now, we shall scrutinize the evidence adduced by the prosecution in the present case in order to establish that accused Pawan Kumar @ Nagraj Sahu made extra judicial confession before Rajesh Kumar Dubey (PW-8), Mahendra Singh Gill (PW-9) & Pritam Singh (PW-10) that he committed the murder of Abhayram & Mukutdhar by crushing them under the tanker bearing

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No.MP-24/A-5354 on 31st October, 1999 at about 5 p.m. at Dhamdha Durg Road at the instance of his friend (Mitan) co-accused Kamta Prasad Lodhi. The trial Court has believed the evidence of the above three witnesses and reached to the conclusion that accused Pawan Kumar made voluntary and true extra judicial confession before these three witnesses. We have scrutinized the evidence of these three witnesses before whom the accused is said to have made extra judicial confession. It is clear that on the relevant day accused Pawan Kumar was working as Driver/Cleaner of the tanker of Mahendra Singh (PW-9), Pritam Singh (PW-10) was Driver of the jeep of Mahendra Singh (PW-9) and Rajesh Kumar Dubey (PW-8) used to look after the Court & R.T.O. cases of Mahendra Singh (PW-9). Close scrutiny of the evidence of the above three witnesses shows that their evidence in respect of the extra judicial confession made by accused Pawan Kumar before them is shaky and to a large extent contrary to each other on the point of time & place, and their evidence does not inspire full confidence about truthfulness of the extra judicial confession made by the accused for the following reasons: -

- Mahendra Singh (PW-9) has stated that on 31-10-1999 at about 7 - 7.30 p.m. accused Pawan Kumar telephoned him that murder has taken place by the tanker. On hearing this, PW-9 asked the accused that the vehicle be parked in the Chikhli Farm House compound. Next day morning, at 9 - 9.30 a.m. he went to Chikhli Farm House, where mechanic Ashok and 2-3 other persons were taking out the silencer which was stuck between the two rear wheel tyres of the tanker. Accused Pawan Kumar, mechanic Ashok, Pritam Singh, Rajesh & Sunil Shrivastava were also present there. Accused Pawan Kumar was telling that he has committed the murder of two persons by crushing them under the tanker near Dhamdha. On this, PW-9 asked accused Pawan Kumar that previous day he asked him to go to Bhilai Steel Plant for filling oil, then why he went to Dhamdha. Accused Pawan Kumar replied that he told the other tanker driver to fill oil from Bhilai Steel Plant and he went along with his friend to Dhamdha where they consumed liquor and when father & son were going on scooter, he crushed them under the tanker.

- Whereas, Rajesh Kumar Dubey (PW-8), who is journalist by profession, looking after the work of Mahendra Singh in R.T.O. office & court cases

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and about whom Mahendra Singh has stated that he was present in the Chikhli Farm House on 1st November, 1999 where the accused made extra judicial confession, has stated that next day of the year 1999 Deepavali, accused Pawan Kumar @ Nagraj Sahu came to his house at about 9 - 9.30 a.m. and said that he has to apply for anticipatory bail on which, PW-8 enquired from him as to why he wants to apply for bail, then the accused made extra judicial confession before him that his friend Kamta Prasad Lodhi of Village: Sonesarar had animosity against Abhayram Patel, therefore, on being asked by Kamta Prasad (his friend), he has committed the murder of Abhayram and his son by crushing them under the tanker on Dhamdha Durg Road near Paroda turn. The son of Abhayram was saved, therefore, he reversed the tanker and again crushed him under the tanker. Silencer of the scooter of the deceased persons was stuck between the rear wheels of the tanker. On third day of telling this incident by the accused, PW-8 went to Chikhli Farm House of Mahendra Singh and disclosed to Mahendra Singh about the extra judicial confession made by the accused. Mahendra Singh replied that the accused has disclosed the same to him also. The tanker was standing at the farmhouse of Mahendra Singh. Mahendra Singh also disclosed him that he asked mechanic Ashok Nirmalkar to check the wheels and before him Ashok Nirmalkar found the silencer stuck between rear wheels. Thereafter, he informed Police Station: Dhamdha from there.

- In para 5 of his evidence, Rajesh Kumar Dubey (PW-8) has further stated that the murder was committed on 31st October, 1999, at that time, he was at Dehradun and on 4th or 5th November, 1999 he returned to Bhilai on the day of Laxmi Puja, next day, accused Pawan Kumar @ Nagraj Sahu came and informed him. Therefore, that goes to 5th or 6th November, 1999, whereas Mahendra Singh (PW-9) has categorically stated in 1st para of his evidence that the accused made extra judicial confession on 1st November, 1999 at his farm house before mechanic Ashok, his driver Pritam Singh, Rajesh (PW-8) and Sunil Shrivastava. Whereas, Rajesh Kumar Dubey (PW-8) has stated that he returned only on 4th or 5th November, 1999 from Dehradun and he was not at Bhilai or Durg at that time.

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- When the very evening accused Pawan Kumar informed Mahendra Singh (PW-9) over telephone about the murder committed by him, why he did not report the matter to the Police, his reply in cross-examination para 10 was that he did not inform the Police because he is not that much vigilant. Thereafter, he has stated on his own that by that time the statement of the accused was not confirmed as the accused was in drunken condition. But even then, he himself never informed the Police. He has further stated that on 2nd November, 1999, the Police met him and enquired from him about the ownership of the tanker bearing No.MP-24/A-5354, then he replied that the tanker belongs to him. The C.S.P. further asked him, "are you aware that the tanker has committed murder" then he said yes. When he was asked about the tanker, then he said that the tanker has gone to Bhilai Steel Plant for filling of oil to take the same to Renukot. When he was knowing that the murder has been committed by his tanker, then why he allowed the truck to go to Bhilai Steel Plant to fill-up the oil and take the same to Renukot, is not known. His explanation that he is not that much vigilant to inform the Police, itself shows the quality of evidence given by him. It has come on record that he is the owner of fleet of 18 tankers and he is running a transport business. How can it be possible that he is not aware of the fact that if crime has been committed by his vehicle, then whether he is required to report the matter to the Police or not, is not believable. Thereafter, Mahendra Singh has stated that after talks with the C.S.P. he asked his son to bring Pawan who has taken the tanker. His son went and traced the tanker near Simga, he brought Pawan, however, the truck went to Renukot. In para 11 of his cross-examination, he has stated that on the very day Nagraj informed him over telephone about the murder and next day he read in newspaper about the murder committed by the tanker. Thereafter, the Police came to him. But this person (PW-9) never reported the matter to the Police.

- In the evidence of Mahendra Singh (PW-9) he has made certain improvements. In para 14 of his evidence he has stated that while giving statement Ex.D-3 to the Police, he disclosed that the accused confessed before him that when father & son were returning on the scooter in the

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evening he crushed them under the tanker, he does not know why the Police has not mentioned this fact in his statement. He has further stated that on 2-11-1999 on his direction, the accused took the tanker to Bhilai Steel Plant. In spite of knowing that the crime was committed by the tanker, why he sent the tanker, he replied that he did so, because, the accused should remain under his supervision. He further replied that he informed to the Police while giving statement that accused Nagraj has disclosed to him that he went to Dhamdha with his friend, he does not know why this fact has not been mentioned in his statement before the Police Ex.D-3. He has further stated that he is not much educated, therefore, he had neither handed over the accused nor the tanker to the Police on his own and the tanker was standing 5-6 days in his farm house.

- Rajesh Kumar Dubey (PW-8) in para 13 of his evidence has stated that it is incorrect to say that on the day of the accident, the tanker was got repaired by Mahendra Singh and it was sent to Renukot, whereas, Mahendra Singh (PW-9) has categorically stated that the very next day of the accident, the tanker was sent to Renukot. PW-8 has stated that on third day he went to the farm house of Mahendra Singh and asked mechanic Ashok to check the rear wheels of the tanker, in his presence Ashok checked the rear wheels of the tanker and the silencer was found stuck there, whereas, in fact, as per the evidence of PW-9, the very next day, the truck was sent to Renukot.

- Now, coming to the evidence of Pritam Singh (PW-10), who is working as Driver of the jeep of Mahendra Singh, he has stated that on 3rd November, 1999 i.e. 3 days after the accident, at about 10 a.m., in Chikhli Farm House, accused Nagraj disclosed him that he took the tanker to Dhamdha along with his friend Kamta, Kamta was having some animosity against some person, therefore, he has committed the murder of two persons by crushing them under the tanker and they died on the spot. Accused Nagraj has further stated that he will commit the murder of three persons more. PW-10 has disclosed about this to Mahendra Singh. Whereas, Mahendra Singh (PW-9) has stated that very next day morning, the accused disclosed about the commission of murder by him in the

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presence of Ashok, Pritam Singh & Rajesh Kumar Dubey. PW-10 has stated that the accused disclosed to him about the incident only on 3rd November, 1999. When on the very next day, Pawan made extra judicial confession in the presence of Mahendra Singh, where was the necessity for Pawan to again make confession on 3rd November, 1999 before this witness (PW-10) and telling by this witness to Mahendra Singh that the accused has made confession before him. In para 5 of his cross-examination, PW-10 has categorically stated that he came to know only three days after the incident on being told by accused Nagraj and he had no knowledge about committing the murder by the accused on very next day of the incident. He has further stated that it is incorrect to say that Nagraj took the tanker very next day to Renukot and it is totally incorrect.

- Ashok Nirmalkar has been examined as PW-13 in whose presence and before whom the accused said to have made extra judicial confession very next day morning of the incident i.e. on 1st November, 1999 in the presence of Mahendra Singh (PW-9). He has stated in his evidence that he is working as mechanic at the Chikhli Farm House of Mahendra Singh, few days before Deepavali festival, his owner asked him to check vehicle No.5354, on checking he found that silencer of scooter was stuck between the rear wheels and "Smart" word was written on the silencer. The Police seized that silencer under Ex.P-12. As per Ex.P-12, the silencer was seized on 12-11-1999. Therefore, his evidence contradicts the evidence of Mahendra Singh (PW-9) who has stated that in the presence of this witness the accused disclosed about the commission of murder on 1st November, 1999.

- Hence, the evidence regarding extra judicial confession made by the accused before the above witnesses is shaky and each of them had given contradictory evidence before the Court. Mahendra Singh (PW-9) has improved his evidence before the Court. In the circumstances, it is not safe to rely on such evidence of extra judicial confession, as such, without any corroboration in material particulars by other cogent evidence it is unsafe to convict the accused based on the evidence of these four

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witnesses on the basis of extra judicial confession made before them. In fact, there is no cogent and clear evidence on record to corroborate the extra judicial confession made by the accused.

Second circumstance

20. As far as this circumstance is concerned, Janki Bai (PW-11), widow of Abhayram, has stated in her evidence that accused Kamta installed a bore well and when the land was measured it was found that the bore well was installed on their land, therefore, there was dispute between her husband, sons and Kamta. The accused gave threatening to her husband & son to commit their murder. Raj Kapoor Patel (PW-14) has also stated that there was a dispute between accused Kamta and deceased persons in connection with land. The land was got measured through the Patwari and it was found that the bore well was installed by accused Kamta in the field of Abhayram. Pushkar Patel (PW-2), son of Abhayram, has also stated in his evidence that there was a land dispute between his family and the accused.

21. Suresh Tiwari (PW-22), Sub Inspector, has also stated in para 28 of his evidence that a dispute was going on between the deceased family and Kamta, in order to bound both the parties, the Police initiated proceedings under Section 116 of the Cr.P.C. on 9-11-1998 which was registered at serial Nos.146 & 147 of the register. In the year 1999, the dispute again started between the two families and on 22-8-1999, parties were asked to execute bonds under Section 116 (3) of the Cr.P.C. On 5-8-1999, Arjundas, brother of accused Kamta lodged a report against the family of the deceased party that they had beaten him, case was registered and the matter was entered in Roznamcha Sanha at serial No.155.

22. Therefore, there is evidence to the effect that there was a dispute between family of the deceased persons on the one hand and accused Kamta on the other hand.

Third circumstance

23. As far as the offence punishable under Section 120-B of the I.P.C. is concerned, Section 120-A of the I.P.C. defines criminal conspiracy which envisages that

"When two or more persons agree to do, or cause to be done,

(1) an illegal act, or

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(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

24. The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.

25. For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

26. Direct evidence of the conspiracy is seldom available. The ingredients of the offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing

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by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

27. In the matter of **Bhagwan Swarup Lal Bishan Lal** vs. **State of Maharashtra** reported in **AIR 1965 SC 682**, the Apex Could held that "there is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence".

28. Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.

29. In the matter of **E.K. Chandrasenan** vs. **State of Kerala** reported in **(1995) 2 SCC 99**, the Apex Court held that

> "Conspiracies are not hatched in the open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence."

30. In this connection, Section 10 of the Indian Evidence Act, 1872, is also relevant which enumerates that

> "Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving

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> the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

For attracting the provisions of Section 10 of the Evidence Act, it is necessary that a prima facie case of conspiracy has to be established. Section 10 comes into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a prima facie evidence that the person was a party to the conspiracy before his acts can be used against his co-conspirator. Once such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others. It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it.

31. In the light of the above principles laid down by the Apex Court, we have to scrutinize the evidence adduced by the prosecution in this case, in order to establish by adducing circumstantial evidence that accused Kamta on account of animosity with deceased persons Abhayram & Mukutdhar entered into conspiracy with Pawan @ Nagraj, Ashwani Kumar, Ganesh, Dileep & Raju to commit their murder.

32. Case of the prosecution, as has been mentioned in the earlier part of the judgment is that on account of animosity between Kamta and deceased persons Abhayram & Mukutdhar, on 31.10.1999, accused Pawan along with other persons brought tanker bearing No.MP-24/A-5354 to the house of accused Kamta in Village: Sonesarar, there they consumed liquor and were talking, accused Kamta abusing the deceased said that "today he has to be killed and he should not escape. This was heard by Khemuram. The tanker was being driven by Ashwani. When Abhayram & Mukutdhar left for Dhamdha, the tanker followed them to Dhamdha. The accused persons assembled at Dhamdha along with the tanker in question, they were watching the movements of Abhayram & Mukutdhar, when the deceased persons left Dhamdha on their scooter to go to their village, the tanker followed them and accused Kamta along with Ganesh & one person followed the tanker on the bullet. In order to establish conspiracy, the prosecution has examined Janki Bai (PW-11), Raj Kapoor Patel (PW-14), Suresh Tiwari (PW-22) -

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Investigating Officer, Romnath (PW-16), Kamta Patel (PW-6) & Surya Prakash Patel (PW-7).

33. In the first instance, as per the prosecution case, when the accused persons were consuming liquor at the residence of Kamta on 31st October, 1999, one witness Khemuram heard Kamta saying "आज साले लोगों को मारना है बचना नहीं चाहिए". Therefore, Khemuram was very important witness to establish conspiracy that the accused persons were sitting at the residence of Kamta and they were talking about the commission of murder, but he has not been examined by the prosecution.

34. Janki Bai (PW-11), wife of deceased Abhayram, has stated in her evidence that Kamta, Ganesh & Ashwani are known to her, indicating towards accused Raju she stated that he is friend (Mitan) of Kamta. She has stated that 3-4 days before Deepawali, one tanker was standing at the residence of Kamta, her husband & son left for Dhamdha on a scooter, at that time, the tanker was standing at the residence of the accused, at about 3-3.30 p.m. she saw the tanker was going and Kamta was also going in motorcycle, in the evening she came to know about the incident. In examination-in-chief, she has stated that the accused installed a bore well on their land, therefore, the dispute started and Kamta threatened her husband Abhayram & son Mukutdhar to commit their murder. In cross-examination she has stated that she does not why this fact has not been mentioned in her police diary statement Ex.D-5. She has further stated that while giving statement to the Police she disclosed to them that the tanker was standing in front of the house of Kamta, she does not know why this fact has not been mentioned in her police diary statement Ex.D-5. In her police diary statement Ex.D-5 the fact that the tanker was standing in front of the house of Kamta, thereafter, Kamta and the tanker left has not been written. Therefore, this witness has made improvement in her Court evidence, to that extent and to the extent of giving threatening to her husband & son about killing them in her presence cannot be believed. In the circumstances, her evidence in order to establish conspiracy is of no use.

35. Raj Kapoor Patel (PW-14) has stated in his evidence that accused Kamta, Ganesh & Shrawan, who is also known as Ashwani, are known to him. Indicating towards accused Rajesh, this witness has stated that he is friend (Mitan) of accused

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Kamta. He has further stated that the death of Abhayram occurred by tanker. Accused Kamta installed a bore well on the land of Abhayram, therefore, the dispute arose between the deceased and the accused on which, the land was measured through the Patwari and it was found that the bore well was installed on the land of Abhayram. Therefore, Kamta told Abhayram that if he will possess that land, then he will commit his murder. The son of Abhayram went to lodge report in Police Station. But, in cross-examination, he has stated that he did not disclose to the Police about the dispute of Abhayram that 4 months back Kamta tried to encroach upon the land of Abhayram and the Patwari was called to measure the land, he does not know how it has been written in the police diary statement Ex.D-6. From the evidence of this witness it has come on record that there was a dispute between the accused and the deceased regarding the land and that the accused threatened the deceased with dire consequences.

36. Ramnath (PW-16) has stated in his evidence that on Sunday evening at about 4 O' clock one tanker was standing in front of the house of Kamta which was driven by Ashwani towards Dhamdha. In cross-examination, he has stated that many a times, oil tanker comes to his village and it was parked there. On that day, he saw Ashwani Kumar driving the tanker and he parked the tanker near the house of Kamta. In cross-examination, he has stated that he does not know accused Pawan @ Nagraj because he is not residing in his village, he is seeing Pawan for the first time and he had not seen Pawan in the village on the day when Abhayram & Mukutdhar died. If the evidence of this witness is scrutinized, in the first instance, he has not disclosed the number of the tanker and the tanker with which Abhayram & Mukutdhar were murdered was not got identified by this witness in order to establish that the tanker which he saw standing near the house of Kamta was the same by which Abhay & Mukutdhar were crushed. Apart from that, case of the prosecution is that the tanker was driven by Pawan @ Nagraj whereas, this witness has stated that he did not saw accused Pawan at the house of Kamta or in the village on the fateful day and further he has stated that the truck was being driven by Ashwani, not by Pawan. Therefore, from the evidence of this witness, it cannot be held that the truck bearing No.MP-24/A-5354 was parked near the house of Kamta by which the death of Abhayram & Mukutdhar was caused.

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37. Therefore, by the evidence of Janki Bai (PW-11) & Romnath (PW-16), the prosecution has failed to establish that the tanker bearing No.MP-24/A-5354 was parked on Sunday i.e. 31st October, 1999 in front of the house of Kamta and the same was driven by accused Pawan @ Nagraj.

38. Now, coming to the evidence of Kamta Patel (PW-6) & Surya Prakash Patel (PW-7) in order to establish that accused Kamta and other accused persons assembled along with the tanker in question at Dhamdha, they were watching the movements of Abhayram & Mukutdhar, when they left Dhamdha on scooter for their village Sonesarar, accused Pawan driving the tanker bearing No.MP-24/A-5354 followed them and accused Kamta along with Ganesh followed the tanker on the motorcycle, Kamta Patel (PW-6) has stated that as accused Kamta had taken his wire Tochan, therefore, on the fateful day i.e. Sunday at about 4.15 p.m. he went to the village of Kamta in order to take the Tochan back, but he was not at his residence and it was informed by his father that Kamta has gone to Dhamdha. Therefore, he along with his cousin Surya Prakash Patel (PW-7) left on their scooter to Dhamdha and near the liquor shop they met Kamta. Kamta was there with five persons among them were Kamta, Ganesh, Ashwani and three others who were not known to him. Three persons were sitting in the tanker, whereas Kamta and two others were standing near the trolley. When he asked Kamta about his Tochan, then he said that you come home in the evening and take the Tochan. He and his cousin Surya Prakash started eating eggs in the shop, thereafter, they came to know about the accident. Therefore, they went on the spot of accident and saw that Abhayram & Mukutdhar were the injured persons, they left to inform the family members of Abhayram to their village. PW-6 has further stated that on the day of the accident, he could not meet Abhayram & Mukutdhar. He has further stated that when they came out of the hotel at Dhamdha after eating eggs, accused Kamta was not there. This witness has been declared hostile by the prosecution. In cross-examination, he has stated that it is correct to say that on the day of accident at Dhamdha accused Kamta and his associates were sitting in the tanker and thereafter, he has stated that at that time, accused Pawan, Ganesh & Ashwani were sitting in the tanker and accused Kamta was standing near the betel trolley. Thereafter, he has stated that accused Rajesh was also standing along with Kamta. He has further stated that the portion of his police statement Ex.P-10 to the effect that on coming to know

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about the accident he thought that this is the act of Kamta was not stated by him to the Police. One person came on Suzuki motorcycle and informed about the accident that the tanker has dashed against the scooter rider, he said that the tanker was in very high speed. He has further stated that on that day he saw Pawan, but he is not known to him. He has also stated that deceased Abhayram was brother of his brother-in-law, he attended to the last rites of Abhayram also and thereafter, the Police recorded his statement.

39. From the evidence of Kamta Patel (PW-6), the prosecution has failed to establish that accused Kamta and other accused persons had conspired something. Neither this witness has stated that accused Pawan had driven the tanker, nor he has stated that the tanker followed the deceased persons and thereafter, accused Kamta along with Ganesh & others followed them on the motorcycle, nor the Police had got identified the tanker from this witness in order to establish that the tanker under which Abhayram & Mukutdhar were crushed was the same which was seen by him in Dhamdha market in which accused Pawan was sitting. Moreover, he is closely related to the deceased persons and without any corroboration, it is difficult to rely on his evidence. Therefore, by the evidence of this witness, the prosecution has not been able to establish any link that in pursuance of any conspiracy, accused Kamta, Pawan, Ganesh & Raju assembled there and thereafter, they chased the scooter of the deceased persons on the tanker. Moreover, this witness has not stated that on that day he saw Abhayram or Mukutdhar. He has categorically stated that he had not met Abhayram & Mukutdhar at Dhamdha.

40. Surya Prakash Patel (PW-7) has stated in his evidence that accused Ganesh, Kamta, Ashwani & Rajesh @ Raju are known to him, he does not know Pawan & Dileep, he is seeing them for the first time. Case of the prosecution is that the tanker was driven by Pawan who crushed Abhayram & Mukutdhar, whereas, this witness has stated that he has seen Pawan & Dileep for the first time. Therefore, Pawan who was said to have driven the tanker was not seen by him. He has simply stated that two hours before the accident, he saw Kamta, Rajesh, Ashwani & Ganesh at Dhamdha Bus Stand, they were sitting near the betel trolley and thereafter, he along with his cousin Kamta Patel (PW-6) went to grocery shop, at that time, accused Ganesh, Kamta & Rajesh @ Raju came on bullet at

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Patel Hotel. Ashwani was not with them. This witness has stated that he met Mukutdhar & Abhayram at Sinha Pan trolley, whereas, Kamta Patel (PW-6) who was along with this witness, has stated that he did not met Abhayram & Mukutdhar at Dhamdha market on that day. Therefore, this is the material contradiction in the evidence of Kamta Patel (PW-6) & Surya Prakash Patel (PW-7) who were together.

41. Further, Surya Prakash Patel (PW-7) has stated that when he along with his cousin Kamta Patel (PW-6) was standing at the grocery shop he saw Ganesh, Kamta & Rajesh @ Raju on bullet, he does not know why the said fact has not been written in the police diary statement Ex.D-1. On the day of accident, the accused persons and the deceased persons were not standing together at the bus stand, they were about 100 ft. distance away and he saw accused Ganesh, Kamta & Rajesh @ Raju going on a bullet to Patel Hotel. Based on his evidence, the prosecution has not been able to establish conspiracy hatched up by the accused persons for the reason that this witness has stated that he met Abhayram & Mukutdhar, whereas, his cousin Kamta Patel (PW-6) has stated that on the day of accident, he did not met Abhayram & Mukutdhar at Dhamdha market. Therefore, there is material contradiction in their evidence. PW-7 has not stated that when Abhayram & Mukutdhar left Dhamdha on their scooter and accused Pawan along with any other person driving the tanker followed them, nor the tanker in question has been got identified by this witness in order to establish that the tanker with which the death of Abhayram & Mukutdhar was caused, was being driven by accused Pawan. He has not stated anything that the tanker in question was seen in the market being driven by any person, what to talk of accused Pawan @ Nagraj, and the tanker followed the deceased persons. Therefore, his evidence is also of no help to the prosecution in order to establish conspiracy hatched up between accused Kamta and other accused persons to commit the murder of Abhayram & Mukutdhar.

42. For the foregoing reasons, the prosecution has failed to establish that the tanker bearing No.MP-24/A-5354 was seen by anybody in Village Dhamdha in front of the house of accused Kamta, because, the prosecution has not got identified the tanker by any of the witnesses in order to establish that this particular tanker was standing near the house of accused Kamta, nor anybody had

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made any complaint that the tanker bearing No.MP-24/A-5354 was standing in front of the house of accused Kamta. Even the evidence of Kamta Patel (PW-6) & Surya Prakash Patel (PW-7) is contradictory in respect of the presence of Abhayram & Mukutdhar in the market of Dhamdha, neither they have stated that they saw the tanker following the deceased persons nor that the truck was being driven by accused Pawan. Material witness Khemuram who heard accused Kamta saying "आज साले लोगों को मारना है बचना नहीं चाहिए" has not been examined. Neither there is evidence to establish the prosecution case that in the first instance, the deceased persons left on their scooter and thereafter the tanker in question being driven by Pawan & others followed them nor any evidence has been adduced that all the accused persons were standing together at Dhamdha market and were watching the movements of Abhayram & Mukuthdar. Even the person who saw the act of crushing of the deceased persons by the tanker i.e. Suzuki driver who informed in the market has not been examined in order to commit the murder of Abhayram & Mukutdhar, the tanker deliberately hit the scooter going on wrong side.

43. Therefore, the prosecution has failed to establish the offence committed by the accused persons under Section 120-B of the I.P.C. Even there is no evidence on record that accused Pawan @ Nagraj was driving the tanker in question in rash & negligent manner, dashed against the scooter of the deceased persons. In the circumstances, it is difficult to convict accused Pawan @ Nagraj under Section 304-A of the I.P.C. also, because there is no evidence that the tanker in question was being driven by accused Pawan that too in rash & negligent manner at the time when it dashed against the scooter.

44. For the foregoing reasons, we are of the considered opinion that conviction and subsequent sentences imposed upon the accused/appellants cannot be sustained.

45. In the result, the appeals filed by the accused persons viz., Criminal Appeal No.327/2001 filed by Kamta Prasad Lodhi, Ashwani Kumar & Ganesh; Criminal Appeal No.361/2001 filed by Pawan Kumar alias Nagraj Sahu; and Criminal Appeal No.362/2001 filed by Dileep @ Bathu @ Ashok & Raju @ Rajesh @ Raj Kumar, succeed and the same are allowed. Their conviction and subsequent sentences imposed upon them under Sections 302, 302 read with Section 34 and 120-B of the I.P.C. are set aside. They are acquitted of the above charges.

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- ✓ Accused Pawan Kumar @ Nagraj Sahu is in jail since 1999. He be set at liberty forthwith, if not required in any other case.
- ✓ Other accused persons are said to be on bail. Their bail bonds are discharged and they need not surrender to their bail bonds.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge

Soma